IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 825 of 1992
WITH
CRIMINAL APPEAL NOS.175 AND 176 OF 1993.

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

AND

MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHANUBEN REVANDAS PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR YU MALEK for Petitioners

MR BD DESAI LD APP for Respondent State

CORAM : MR.JUSTICE H.R.SHELAT and
MR.JUSTICE J.R.VORA

Date of decision: 01/02/2000

ORAL JUDGEMENT (Per; H.R. Shelat, J.)

Bhanuben Revandas Parmar and Mahendra Revandas Parmar, Original accused Nos. 4 and 5 were tried of the offences punishable under Sec.306, 498-A and 302 of the Indian Penal Code, by the then learned Additional City Sessions Judge, in Sessions Case No.387/89 on his file, and Bhanuben Revandas came to be convicted qua offence punishable under Sec. 306 only, while Mahendra Revandas came to be convicted of the offences under Sections 306 and 498-A of the Indian Penal Code. Consequently, Bhanuben Revandas came to be sentenced to three years rigorous imprisonment and fine of Rs.500/- in default rigorous imprisonment for 3 months more qua offence punishable under Sec.306 of the Indian Penal Code and Mahendra Revandas Parmar came to be sentenced to rigorous imprisonment for two years and fine of Rs.1000/- in default rigorous imprisonment for six months of the offence punishable under Sec.498-A of Indian Penal Code and rigorous imprisonment for five years and fine of Rs.2000/- in default rigorous imprisonment for one year more qua the offence punishable under Sec.306 of I.P.C., Bhanuben Revandas came to be acquitted of the offences punishable under Sections 498-A and 302 I.P.C. while Mahendra Revandas came to be acquitted of the offence punishable under Sec. 302 I.P. Code. Rest of the four accused are acquitted of the of the offences punishable under Sections 302, 306 and 498-A of the I.P. Code. Being aggrieved by the said order of conviction and acquittal, Bhanuben Revandas Parmar and Mahendra Revandas Parmar who are brother and sister, have preferred Criminal Appeal No.825/92. While rest of the two appeals are preferred by the prosecution. In Criminal Appeal No.175/93, the prosecution prays for enhancement of the sentence inflicted, while in Criminal Appeal NO.176/93, the prosecution challenges the acquittal and prays for conviction qua the offence punishable under Sec. 302, 306 and 498(A) of the Indian Penal Code.

2. Necessary facts may in brief be stated. Ashok Revandas, Rameshkumar Revandas, Rajubhai Revandas and Mahendra Revandas Parmar are the brothers and original accused Nos.1, 2, 3, and 5, while Bhabuben Revandas Parmar - original accused NO.4, is their sister and Manekben Revandas Parmar original accused NO.6 is their mother. Two years prior to the date of incident Mahendra Revandas (Original Accused No.5 - Appellant NO.2 in Criminal Appeal NO.825/92) married Gitaben (now deceased), the daughter of Balubhai Shankarbhai. After the marriage, both were residing along with other accused in Ambedkarvas, Dariyapur in Ahmedabad. Initially their

marriage life was brooming over with pleasure, but by the passage of time whatsoever may be cause, dissention between the two arose. The aforesaid accused were then ill-treating, harassing, taunting and torturing Gitaben persistently, with the result, she was not happy and her life turned to be hellish. Once her maternal aunt left Gitaben at her Natal house informing that she was not wanted. Since then Gitaben was residing with her parents. After about six months, attempts to settle the discordance that had arisen between the two, were made. Jyoti-Sangh, renowned social institution sincerely trying its best to solve social problems of the women was then moved where attempts to settle the dispute was made, but it seems no viable solution could be worked out. Hence, Gitaben continued to reside with her parents. Thereafter, Mahendrakumar, her husband took her to his place directly from Flour Mill where Gitaben had gone to take the grits. Shortly thereafter, on 28th May, 1989, at 7-00 a.m. Gitaben at her in-laws' place poured kerosene on her person and set her ablaze. She was then taken to the hospital for treatment. The Doctor found 90% burns on her person. The police was informed and parents of Gitaben were also informed. On receipt of a message when her father going to the Hospital questioned what the mater was, Gitaben informed her father that in the morning at 2-00 a.m., her Brother-in-laws (Accused Nos.1,2 and 3) had beaten her by kicks and fists blows obsessed with fetishism. She took very seriously ill as the behaviour of her in-laws was incivil and rude. In the morning at 7-00 a.m., therefore she being sentimental went into the kitchen and poured kerosene on herself and set her ablaze. Her father, then lodged the complaint with Dariyapur Police Station. The Police Officer of that Police Station, then, took the investigation on hand, and requested the Executive Magistrate to record the Dying Declaration of Gitaben. He sent the things he had seized to Forensic Science Laboratory for analysis. On receipt of the report from the Forensic Science Laboratory and also Post-mortem Note from the Doctor, a Chargesheet against all the above stated accused relating to the aforesaid offences came to be filed in the Court of the Metropolitan Magistrate, Ahmedabad. The learned Magistrate of that Court was not competent to hear and decide the case. He, therefore committed the same to the City Sessions Court at Ahmedabad which came to registered as Sessions Case NO.387/89. The same was then assigned to the then learned Additional Sessions Judge, for hearing and disposal in accordance with law. The learned Addl. City Sessions Judge, framed Charge at Ex.2 against the accused to which the accused pleaded not guilty and claimed to be tried. The prosecution, led necessary

evidence. Considering the evidence on record, the learned Judge found that the prosecution succeeded in establishing the charge qua offence punishable under Sec. 306 and 498-A of I.P.C. against the above stated two accused namely Bhanuben Revandas Parmar (Sister-in-law of Gitaben) and Mahendra Revandas Parmar (Husband of Gitaben). He, therfore, convicted and sentenced both the accused as aforesaid on 27/8/92; and acquitted them and other four accused as aforesaid. It is against that order of conviction and acquittal, these three appeals have been filed.

3. Mr. Y.U. Malek, learned advocate representing the accused submits that the prosecution has not come forward with true version. The story put forth by the prosecution is not probable and the same is suffering from glaring infirmities. On dying declaration, no doubt, the prosecution relies on much, but the same is not beyond suspicion. The father, mother and grad-mother of the victim - Gitaben, were in-fact not supporting, but the learned judge has erroneously appreciated the evidence, and misconstruing the same, reached the faulty conclusions. When the evidence is considered in its entirety, one would definitely be inclined to believe that the evidence adduced by the prosecution is fishy, and after the incident of accidental death, the police as well as the nearest relatives of Gitaben, joining hands made out a case so as to involve all the accused and filed the complaint, pursuant to the same, investigation on that line to justify the same was made. He then draws out attention to the different material infirmities on record, so as to show to what extent falsehood in evidence has taken root and spread over the entire case is hard to fathom.

4. In reply to such contention Mr. B.D. Desai, learned A.P.P. submits that atrocities on women and domestic violence by in-laws are going berserk day-by-day. It is the demand of the time that the Courts must now heavily come down upon such accused who torture, harasse and illtreat the daughter-in-law or women the Weaker Section in the families. The prosecution's evidence is not fishy, the same is sufficient in the eye of law, wherefrom irresistable and inescapable conclusions in favour of the prosecution are possible and not favouring the defence. On the basis of the Dying Declaration and other evidence already led, the learned Judge was perfectly right in convicting the aforesaid two accused, but was not right in acquitting all the six accused. He, therefore, urges to dismiss the appeal being Criminal Appeal No.825/92 and allow rest of the two

Appeals and pass exemplary order, so that in the society it may have deterrent effect.

5. Before we proceed it may be mentioned that Mr. Malek, the learned advocate representing the abovestated two accused at this stage tenders the Death Certificate, and submits that Mahendra - husband of the victim-Gitaben died on 25th March, 1998. The Death Certificate is taken on record. As Mahendrakumar has died during the pendency of these appeals and neither of his heirs has appeared to proceed with Criminal Appeal No.825 of 1992, all the three appeals abate so far as the same relates to Mahendrakumar Revandas Parmar. We have, therefore, to confine the discussion so far as it relates to Bhanuben, but while referring the evidence, our discussion may cover the issue relating to Mahendrakumar which would assume academic importance.

6. Whenever in the society such incidents qua the women or Weaker Section in the House amounting to domestic violence, happen, the Courts are no doubt deeply concern, and we are of the firm view that such agony menace and atrocities on the women are required to be curbed, coming down heavily upon the wrong doers; but Court can pass harsh order only if the prosecution succeeds in establishing the charge leading necessary evidence, otherwise, Court will be helpless and if evidence is not sufficient, reluctantly the Court will have to pass the order of acquittal. The Court cannot be swayed away with public opinion or agitation and ignoring legal requirements can not convict the accused indiscreetly.

7. It is the case of the prosecution that after the marriage, Gitaben was not treated well. She was treated like a chattel. She was taunted, tortured and agonised both physically and mentally. Often she was beaten and lastly on the date of incident at 2-00 a.m. she was beaten, by her Brother-in-laws showering kick and fist blows. She found that illtreatments that was being meted out persistently, were no longer bearable and made her life not worth living which caused her to breed the idea to end her life, and in fact she did so. Thus the prosecution has come forward with the case of cruelty being meted out to Gitaben and urges the Court to convict the accused-appellant of the offence under Sec.498-A of the Indian Penal Code.

8. It is first necessary to know what is the meaning of cruelty and harassment envisaged by Sec.498-A of the Indian Penal code. This Court came across with such a

question in a case of Indrasing M. Raol Vs. State of Gujarat, 40 (3) [1999 (3)] G.L.R. 2536 = 1999 G.L.H 596, wherein the meaning of cruelty and harassment is made clear in paras 6 and 7, which we reproduced hereinunder;

"The express "cruelty" means and implies harsh and harmful conduct of certain intensity and persistence. It, therefore, covers the acts causing both physical and mental agony and torture, or tyranny and harm as well as unending accusations and recrimination reflecting bitterness putting the victim thereof to intense miseries and woes strongly stirring up her feeling that life is now not worth living and she should die, being the only option left. The provision of Sec. 498-A therefore, envisages intention to drag or force the woman to commit suicide by unabated, persistent and grave cruelty. In one case, therefore, the facts on record may constitute the cruelty showing required intention and in another case, it may not. The concept of cruelty, therefore, is found different or diversifying from the place to place, individual to individual, and also according to social and economical status of the person and several other factors. The Court has, therefore, to becoming more heedful, chary and wary, exert and ascertain the cruelty and required intention on the basis of the culture, ordinary sentimentality or sensitivity, capacity to tolerate, temperament, tendency, inter-se honour, matrimonial relationships, state of health, dissension, interaction, or conflicting ideology, will to dominate, utter disregard or one's own obligation or intractability or habits as well as customs and traditions governing the parties and other governing forces, provided necessary acceptable evidence in this regard is available on record.

"The word "harassment" is not defined in Sec.498-A. The meaning of the work "harass" which can be found from the dictionary is to subject some one to unbearable, continuous or repeated or persistent unprovoked vexatious attacks, questions, demands, or persecutions, or brutality, or tyranny, or harm or pain, or affliction, or other unpleasantness, or grave annoyance, or troubles. In short what can be said is that Sec.498-A will not come into play in every case of harassment and/or cruelty.

> Reasonable nexus between cruelty and suicide must be established. It should, therefore, be shown that the incessant harassment or cruelty was with a view to force the wife to end her life or fulfil illegal demands of her husband or in-laws, and was not matrimonial cruelty, namely usual weal and tear of matrimonial life. It should hardly be stated that the prosecution has to establish the charge beyond reasonable doubt. No doubt arithmetical accuracy is not accepted from the prosecution, but it has to adduce such evidence which would be credible leaving no room to any reasonable doubt; and point to the guilt of the accused."

In view of such meaning of cruelty and harassment made clear, the prosecution has to lead the evidence and establish that the cruelty and harassment were incessant, persistent and unbearable and that too with the intention to force Gitaben to commit suicide. If accordingly, the charge is not established, the case will not fall within the ambits of Sec.498-A of the IPC, though it may fall within the ambits of any other provision of IPC or any other law for the time being in force. We will now proceed to examine whether the prosecution has accordingly proved the charge.

8. The learned APP relies upon the Dying Declaration recorded by the Executive Magistrate which is produced at Ex.13. The prosecution also relies upon the statement recorded by the Police Officer (Ex.51), before F.I.R. came to be lodged. That statement was then treated to be another Dying Declaration because of the death of Gitaben during the treatment in the Hospital. When the prosecution relies upon the Dying Declaration, what are the requirements in law to be satisfied for placing reliance and taking the same into consideration, must be borne in mind. In case of Kundulabala Subrahmanyam Vs. State of Andhra Pradesh (1993) 2 S.C.C. 684, it is made clear that if the Dying Declaration is found to be trust-worthy, conviction can be founded solely on the basis of it. In case there are more than one Dying Declarations, the Court must be satisfied about their trust-worthiness and consistency with each other. In the case of Paparambaka Rosamma and Ors Vs. State of Andhra Pradesh, JT 1999 (6) SC 585, the Supreme Court again making the law clear has held that in case 90% burns injury if found on the person of the victim and the Doctor certifies that the patient is conscious but does not certify that the patient is in fit state of mind, to make the statement such dying declaration cannot be

relied upon and cannot be made a foundation for conviction. In another case of Dandu Lakshmi Reddy Vs. State of A.P. JT 1999 (6) SC 166, it is again made clear that the Criminal Court cannot ignore the evidence of the parents of the deceased, but if the Court has even a slightest doubt about the mental soundness of the author of the Dying Declaration, it would be unsafe to pass a conviction on such a statement, albeit its inadmissibility under Sec.32 of the Indian Penal Code. As the Dying Declaration is tested on the touchstones available in evidence and permitted by law, it does not stand scrutiny. It will be unsafe to convict any person on the strength of such a fragile and rickety Dying Declaration. In that case, the accused was given benefit of doubt. In Padmaben Shamalbhai Patel Vs. State of Gujarat 32 (1) [1991 (1)] GLR 557, the Supreme Court when again came across with a similar question, made the law clear stating that if the Court is satisfied about the truth of the statement made by the injured person, without any corroboration, the sole dying declaration may form the basis of conviction, even if the same is not in question and answer form, and in proper cases, conviction may rest on it. What is, therefore, made clear by the Supreme Court in the above stated decisions is that the dying declaration alone can be made the base for conviction of the accused, but before the same is done, the Court has to be satisfied that the person making the statement was not only conscious but in the fit state of mind also so as to make the statement; and further the dying declaration reflects the true version, the same is voluntary and inspires confidence leaving no room to doubt.

9. Govindlal N. Mehta (Ex.12) is the Executive Magistrate who recorded the Dying Declaration (Ex.13). He has made conflicting statements. At one stage he says that after going to the Hospital he took the opinion of the doctor that the patient was conscious. Later on he says that when he recorded Dying Declaration neither the doctor nor the nurse was present and he did not take the endorsement of the doctor regarding consciousness or other wise of Gitaben after recording of the Dying Declaration was over. It may be stated that there is the endorsement in the margin that the patient is conscious. Such statement casts cloud of suspicion regarding consciousness of Gitaben when her Dying Declaration was recorded. The doctor who is alleged to have made the endorsement in the margin of Dying Declaration is not examined and no cause is assigned for such omission. The say of the prosecution that Gitaben was conscious when Dying Declaration was recorded is not therefore free from

doubt.

10. Apart from such aspect, if it is assumed for a while that Gitaben was conscious, it is also to be shown that she was in the fit state of mind to make the statement. Nowhere on careful examination we find any evidence throwing light on the proposition. The doctor has neither opined nor put up the endorsement on the Dying Declaration that Gitaben was in fit state of mind to make the statement. She could follow, observe, grasp, realize, think, perceive, hear or was able to speak, or by any other gestures was able to convey clearly what she truly and voluntrily wanted to. The Executive Magistrate is also silent on this point. Likewise, is the case with regards to the statement (Ex.51), as by no reliable evidence it is shown that Gitaben was not only conscious but was in the fit state of mind to make the statement. The evidence of Dr. N.N. Parikh (Ex.35) shows that Gitaben sustained burns injuries on face, shoulders, hands, legs and her brain was also affected. It had swollen. The wind pipe, vocal cords and larynx were also affected as carbon particles were found stuck. The liver and kidney were also swollen. Owing to such injuries, complications developed as a result of which Gitaben died. It, therefore, follows that Gitaben's brain must not be functioning well, and due to other injuries she was not in a position to speak. She must not be, therefore, in a fit state of mind to make any statement. In short when consciousness as well as fitness of the state of mind are not clearly established the Dying Declaration (Ex.13) and statement (Ex.51) cannot be taken into consideration; the same are required to be ignored.

11. Dr. Nayankumar N. Parekh (Ex.35) performed the Post-mortem. He could see that on both the hands inclusive of palms, there were 2nd and 3rd degree burns and fingers were also affected. It was hence necessary for the prosecution to show that Gitaben was in a position to hold pen and sign, might be with difficulty; but the prosecution has shrewdly remained silent, and that is suggestive of the fact that Gitaben was not able to hold the pen and sign. Still however we find signature of Gitaben on both the statements. In view of the fact as rightly contended by Mr. Malek the learned advocate for the appellant that the possibility of concoction can not be ruled out. For such reasons both the statements being not safely reliable are required to be kept out of consideration.

12. When dying declaration is for such reasons cannot be made the base for drawing one or another conclusion we

have now to see whether there is any other cogent and appealing evidence on record throwing light on the proposition namely cruel treatment alleged by the prosecution.

13. The prosecution on this point mainly relies on the evidence of father, mother and grand mother of deceased Gitaben because Panchas, neighbours and other witnesses have turned hostile, they throw no light on the proposition and have shown ignorance on the point. We will, therefore, confine out discussion to the evidence of these three witnesses.

14. Balubhai Shankarbhai Patel (Ex.15) is the father of victim Gitaben. He does not support the case of illtreatment being meted out to Gitaben at 2-00 a.m. on the same day when she committed suicide. He is silent on the point. He merely states that when he went to the hospital, after receipt of the message, he came to know putting a question to her daughter Gitaben, that her Sister-in-law Bhanuben poured Kerosene on her and igniting match-stick, threw it on her, but in the Cross-examination, he admits that he has not so stated while lodging the complaint. It may be stated at this stage that the prosecution has come forward with the case that Gitaben on her accord went into the Kitchen and poured Kerosene and Bhanuben - her Sister-in-law reaching there igniting match stick threw on her. But her father has come forward with some improvement stating that Kerosene was also poured by Bhanuben - Sister-in-law of the victim and then in the Cross-examination states that he did not so state while lodging the complaint. When he is improving the case so as to see that accused are convicted any how, his testimony cannot be accepted without any cogent corroboration.

15. Shardaben Bhanubhai (Ex.16) is the mother of Gitaben. She has no doubt stated about the cruel treatment being meted out to Gitaben, but when her Examination-in-chief was about to be concluded she has stated that she was not knowing why Gitaben died. Making such statement she set at naught what, she has stated regarding the illtreatment. But for a while the same statement is ignored, her testimony on the cruel treatment given to Gitaben appears fishy. Of course, in the Examination-in-chief, she has stated that after the maternal aunt of Mahendra Revandas left Gita at her place, she was informed by Gita that Mahendra - her husband, was often beating her taking liquor; not only that but her Mother-in-law and two Sister-in-laws and Brother-in-laws were also thrashing her. They thereafter

thought it wise to approach the Institution alike a good samaritan fighting for the women's good and helping the doleful women by attempting to solve their enigmas and problems, because Gitaben was threatened with dire consequences if she failed to bring Rs.1000/- from her parents. No doubt, she has accordingly tried to support the case of cruelty, but when unable to face the grilling Cross-examination, she had to admit that she did not so state when the Police recorded her statement. It follows that she made improvements in her case, when she appeared before the Lower Court for giving evidence. It may be mentioned that her husband i.e. the father of Gitaben does not state anything on this point though Shardaben has stated on the cruel treatment. The evidence of Shardaben modulating the story for securing conviction, cannot be accepted. She also does not find any corroboration from her husband too.

16. Shiviben Shankarbhai (Ex.21) is the Grand-mother of deceased Gitaben. Of course, she has been declared hostile as she did not support the case of the prosecution, but it is not the law that the evidence of such witness is to be discarded in its entirety. On a particular point if corroborative evidence is available, the evidence of such witness relating to that point can be accepted. On the basis of the above stated facts, it appears that because of the injury to the brain, the same was not working, and therefore, it was not possible for Gitaben to follow correctly, or speak, or make any statement, because she was not in a fit state of mind. Shiviben Grand-mother of the victim Gitaben also supports this fact stating that when she went to the hospital for asking Gitaben, she stated nothing to her, meaning thereby that she was not in a position to speak or make any statement. She has also made it clear in her Cross-examination that Mahendrabhai, the husband of Gitaben was maintaining Gitan well and all in the family were living together harmoniously and concordantly with each other, no one ill-treated her. Whenever Gitaben used to see her prior to the incident and after the marriage, she used to tell that she was happy at her in-laws place and all were living harmoniously. She has also made it clear when asked that Gita died because of the accident. Of course, she has made contrary statements qua ability to speak; and even if those statements are kept aside, rest of her evidence shows that Gitaben was having no ill-treatment, no cruel treatment from her in-laws after the matter was settled through Jyoti-sangh and owing to the mediation of the elders in the family, every one in the family was living together harmoniously. Siviben on such fact finds

support from other witnesses who have guardedly made the statement so as to maintain relations with both. Thus the evidence on which the prosecution relies show that there was in fact no cruelty as alleged by the prosecution and cruel treatment was not at all there in the way envisaged by Sec.498-A and stated hereinabove. Thus, there is no other evidence on record which would show that Gitaben was treated with cruelty as envisaged by Sec.498-A of the Indian Penal Code.

17. At this stage, our attention is drawn to the evidence of Kajalben Pankajbhai (Ex.32) who is a social worker, rendering services in Jyoti-Sangh. Of-course, Kajalben has no-doubt produced the file from her office which was prepared by Kokilaben Shah - another social worker who was not available for giving evidence before the trial court because she, at the relevant time had gone to America. For want of necessary, primary proof the file which Kajalben has produced, is not proved and admitted in the evidence and therefore whatever statement Gitaben made before the Social Worker at that time in Jyoti-Sangh cannot be taken into account. Even if it is believed that as alleged by the prosecution Gitaben was being illtreated and harassed both physically and mentally and because of the conciliation of Jyoti-Sangh, the matter was settled amicably, the prosecution cannot succeed. As per the law made clear by this Court in Indrasing M. Raol's Case (Supra), it must be proved that the cruel treatment continued persistently and the same was unbearable and was proximate cause of suicidal death. If after the last incident and the incident in question, considerable time has passed, with no incident of cruel treatment, it cannot be said on the basis of last incident that the cruel treatment was continuous and persistent; and so in that case Sec. 498-A will not come into play, as submitted by Mr. Desai learned APP. Necessary file was prepared by Jyoti-Sangh on 10th February, 1988 and around 20th February, 1988, the dispute between the two was settled. Thereafter, Gitaben went to her father's place. As made clear by her mother, Gitaben stayed with her for about 9 months. The same can be spelt out from the facts emerging from the evidence of Gitaben's father as well as F.I.R. It can, therefore, be said that two months thereafter, i.e. on or around 20th February, 1988, Gitaben went back to her matrimonial house and thereafter the incident in question happened on 28/5/89. She stayed at her in-laws place for about 15 months. As made clear by her Grand-mother Shiviben, no incident amounting to cruel treatment took place after the matter was settled through Jyoti-Sangh. If that is so, the cruel treatment cannot he said to be persistent,

continuous and unbearable. The last incident that took place prior to the settlement arrived at through Jyoti-Sangh, cannot be said to be the proximate cause of the incident in question. In view of the fact, the cruel treatment as envisaged by Sec.498-A of the Indian Penal Code is not established by the prosecution. When that is so, the learned Additional Sessions Judge was, in our view, not right in convicting Mahendra Revandas Parmar, the husband of Gitaben.

18. When cruel treatment as envisaged by Sec.498-A of the I.P.C. is not established, the charge under Sec.306 will not survive, because Sec.306 comes into play only when cruelty as envisaged by Sec.498-A is established. However, Mr. B.D. Desai, learned APP at this stage, draws our attention to Sec.113-A of the Indian Evidence Act and submits that in the case on hand presumption against the appellants would arise because the incident happened within two years of the marriage. According to him, it would, hence be proper and just to convict the appellants of the offence under Sec.306 of the Indian Penal Code, on the basis of the presumption.

19. The contention gains no ground to stand upon. The provision of Sec.113-A Evidence Act raising presumption came to be inserted by amendment and came into force from 20th December, 1983. The object of the provision is to protect the woman, because the newly married woman transplanted in the new family takes time in getting herself firmly rooted in the family and till she firmly gets herself rooted. she is vulnerable to various adverse factors amounting to cruelty, but the salutary provision enabling the Court to raise the presumption is not to be invoked mechanically, or without any base. For attracting the presumption under Sec.113-A, it must be established that the woman was subjected to cruelty as defined in Sec.498-A and made clear hereinabove. The Court has to circumspect and consider all attending facts and circumstances of the case. The Court has to essay its best and find out whether the prosecution has succeeded in establishing that (1) marriage of the deceased had taken place within 7 years preceding the incident, (2) the deceased was subjected to cruelty as envisaged by Sec.498-A; and (3) the woman (deceased) committed suicide. To put the same shortly in other words, the presumption can be drawn only when the prosecution has discharged its initial onus of proving cruelty under Sec.498-A I.P. Code.

20. In the case on hand, all these requirements are not satisfied for the reasons stated hereinabove and

therefore, the presumption as canvassed by Mr. Desai, learned APP cannot be raised. When that is so, the learned Judge who proceeded on this line, was not right in convicting Bhanuben for the offence punishable under Sec. 306 of Indian Penal Code.

21. It is the case of the prosecution that Bhanuben igniting match stick threw on the person of Gitaben after Gitaben poured Kerosene on herself, and thereby she committed the offence of murder because Gitaben succumbed to the burns injury later on. Such case of the prosecution cannot be held to have been proved looking to the evidence that is led by the prosecution.

22. We will now examine the evidence qua alleged murder committed by Bhanuben, the Sister-in-law of the deceased. According to the case of the prosecution, when Gitaben after going into the Kitchen poured Kerosene on herself, Bhanuben immediately rushed there and igniting the match-stick threw on her person with the result Gitaben caught fire and sustained burn injuries and later on succumbed to the same during the course of treatment in the hospital. On this point, the prosecution mainly relies upon the aforesaid dying declaration, but for the reasons stated hereinabove, the same has to be kept out of consideration. When that is so, the learned APP drew out attention to the only evidence of the father of victim recorded at Ex.15. Babubhai Shankarbhai - father of the victim has on the point stated that when he went to the hospital, in reply to his question Gitaben stated that her sister-in-law Bhanuben poured not only Kerosene but also igniting the match-stick set her ablaze. His such statement, for the reasons stated hereinabove while discussing his evidence, cannot be accepted as the evidence inspires no confidence. It may, however, be stated that the witness while lodging the complaint has not stated this fact and that is the circumstance to disbelieve his version on the point. The mother does not know because she had not gone to the hospital, and the grand-mother as stated hereinabove supports the defence rather than the prosecution; and she on the contrary states that Gitaben died because of accident while she was preparing tea. There is no other evidence on the record throwing light on the proposition; but at this stage we cannot miss to take a note of the Vardhi Ex.42 which was given to the police constable Gajanand by Dr. Naik who treated Gitaben soon after she was admitted in the hospital. As per the message he received from Dr. Naik a Vardhi was sent and according to that Vardhi it appears that Gitaben before the Doctor made it clear that she sustained burns injury when she was in the morning at

8.00 preparing the tea in the Kitchen. She has not stated that Bhanuben did the wrong. In view of such evidence on record, it is abundantly clear that the prosecution has failed to establish the charge of murder. The learned Additional Sessions Judge was therefore right in acquitting the accused qua the offence of murder.

23. On no other point, either of the learned advocates, submitted. For the aforesaid reasons, Criminal Appeal No.825 of 1992 is required to be allowed, while rest of the two appeals are required to be dismissed. In the result, Criminal Appeal Nos.175 and 176 of 1993 are hereby dismissed, while Criminal Appeal No.825 of 1992 is hereby allowed, and the judgement and order of conviction relating to the offence punishable under Sec.306 and 498-A of the Indian Penal Code and sentence qua thereof inflicted on the aforesaid two appellants are hereby quashed and set aside and they are acquitted thereof. Bhanuben Revandas Parmar at present being on bail, her bail bounds shall stand cancelled. Fine if paid be refunded.

****

rafik